

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of

LOCAL TELEVISION
ASSOCIATES, INC.

CHARLES FITZGERALD

WEBBER/MOORE BROADCASTING
COMPANY LIMITED PARTNERSHIP

For Construction Permit for a
New Commercial Television
Station on Channel 35 at
Jacksonville, North Carolina

MM Docket No. 92-309

File No. BPCT-911106KF

File No. BPCT-920114KF

File No. BPCT-920114KG

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Honorable Joseph Chachkin
Administrative Law Judge

PETITION FOR LEAVE TO AMEND AND
REQUEST FOR AUTHORITY FOR SATELLITE OPERATION

Local Television Associates, Inc. ("LTA"), by its attorneys
and pursuant to Section 73.3522 of the Commission's Rules, hereby
petitions for leave to amend its above-captioned application as
follows:

- (1) Change the applicant to a new North Carolina corporation in the process of formation, an entity which, subject to approval and effectuation of a comprehensive settlement being filed concurrently herewith, shall reflect a merger between the shareholders of LTA and mutually exclusive applicant Charles Fitzgerald.
- (2) Amend the application's technical showing. The new applicant will adopt the Fitzgerald technical proposal.
- (3) Amend the application to delete the divestiture commitment for station WFXI(TV), Morehead City, North Carolina, and to specify that following grant of the construction

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permit, the Jacksonville station will operate as a satellite of station WFXI(TV).

1. It is shown below that good cause exists for acceptance of the proffered amendment, as the amendment will facilitate a universal settlement of this proceeding, expedite broadcast service to the community of Jacksonville, and conserve the resources of the Commission and the parties. Further, it is shown that grant of authority to allow the Jacksonville facility to operate as a satellite of WFXI(TV) fully complies with the satellite exception to the television duopoly rules, as the proposal satisfies the criteria established by the Commission for establishing that the satellite operation is presumptively in the public interest.

Background

2. By Hearing Designation Order, DA 92-1682 (M.M. Bur., released January 11, 1993) ("HDO"), the mutually exclusive applications of LTA, Fitzgerald, and Webber/Moore Broadcasting Limited Partnership ("Webber/Moore") were designated for comparative hearing.^{1/} Concurrently herewith, the three applicants are filing a joint request for approval of two agreements that will result in a universal settlement of this case. Collectively, the settlement agreements contemplate: (i) the dismissal, with prejudice, of the Fitzgerald and Webber/Moore applications; (ii) the amendment of the LTA application to substitute a new corporation as the applicant, a merged entity of

^{1/} A fourth applicant, LP Media Incorporated, was dismissed in the HDO for failure to file the required hearing fee.

which LTA shareholders shall hold 75% of the outstanding voting stock and Fitzgerald shall hold 25%; (iii) the grant of the application, as amended herein; and (iv) the grant of a request by the new corporation to operate the Jacksonville station as a satellite of WFXI(TV), Morehead City, North Carolina.

3. The attached amendment is submitted in furtherance of the proposed settlement agreements. Specifically, the amendment seeks to (i) substitute a new North Carolina corporation for LTA as the applicant; (ii) amend the technical portion of LTA's application to adopt the technical proposal specified in Fitzgerald's application; and (iii) propose operation of the Jacksonville station as a satellite of WFXI(TV).

4. WFXI(TV) is licensed to LTA. The Grade B contours of WFXI(TV) and the proposed Jacksonville station overlap, therefore implicating Section 73.3555(b) of the Commission's Rules, the television "duopoly" rule. Note 5 to Section 73.3555, however, provides that

Paragraphs (a)-(e) of this section will not be applied to cases involving television stations that are "satellite" operations. Such cases will be considered in accordance with the analysis set forth in the Report and Order in MM Docket No. 87-8, [6 FCC Rcd 4212 (1991) ("Satellite Policy Statement")]] in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest.

Accordingly, this pleading contains a showing that this combination complies with Note 5 to the television duopoly rule. As shown below, the proposed parent/satellite operation of WFXI(TV) and the Jacksonville facility satisfies the Satellite

Policy Statement's criteria for being presumptively in the public interest.

I. Good Cause Showing for Acceptance of Amendment

5. Section 73.3522(b) of the Commission's Rules requires that postdesignation amendments be supported by a showing of good cause for their acceptance. Good cause must be viewed in light of the fact that its acceptance will facilitate a universal settlement of this proceeding. In cases where an amendment facilitates such a settlement, the Commission has traditionally found good cause for amendments such as that proposed here. See Finley Willis, Jr., 7 FCC Rcd 2953 (Rev. Bd. 1992) (good cause found for accepting amendment to use competing applicant's transmitter site since grant of the amendment would facilitate settlement); Judith O. and Larry R. Orkus, 7 FCC Rcd 20 (Rev. Bd. 1992) (accepting amendment reflecting settlement merger between applicants and new technical proposal); Marlin Broadcasting of Central Florida, Inc., 3 FCC Rcd 6965 (Rev. Bd. 1988) (accepting amendment reflecting merger agreement and substitution of dismissing applicant's engineering proposal). As the proposed amendment facilitates the settlement of this case, good cause plainly exists for acceptance of the proffered amendment.

II. Satellite Operation of the Jacksonville Facility Complies with the Commission's Satellite Policy

6. As stated above, this Petition requests authority for the operation of the Jacksonville station as a satellite of LTA's WFXI(TV), Morehead City, North Carolina, as specified in the

attached amendment. Under the Commission's 1991 Satellite Policy Statement, applicants for television satellite status are entitled to a presumption that the proposed satellite operation is in the public interest, and thus in compliance with the television duopoly rules, if the following three criteria are met:

- (1) there is no City Grade contour overlap between the parent and the satellite;
- (2) the proposed satellite would provide service to an underserved area; and
- (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station.

6 FCC Rcd at 4213-14.

7. Exhibit A hereto is a statement by Mr. Fitzgerald's consulting engineer that there will be no City Grade overlap between the Jacksonville station and WFXI(TV). This satisfies the first criterion of the presumptive test.

8. A proposed satellite station is considered to serve an "underserved area" if there are two or fewer full-service stations already licensed to the satellite's community of license. At present, only one full-service television station, non-commercial educational station WUNM-TV, is licensed to Jacksonville.^{2/} Thus, the second prong of the test is satisfied.

9. The third prong of the test -- that no alternative operator is ready and able to construct and operate the proposed

^{2/} That station is itself a satellite of WUNC-TV, Chapel Hill, North Carolina. The North Carolina Public Broadcasting Service operates three stations to provide service to this market.

satellite as a full-service station -- is also satisfied in this case. There are only three applications pending for the Jacksonville facility. Implicit in the proffered amendment is the fact that two of these applicants, LTA and Fitzgerald, have determined that operation of the Jacksonville station as a full-service facility is not feasible. Mr. Fitzgerald's own declaration states that he has reviewed market economics, and concluded that a new full service, stand-alone television station is not economically feasible in this market. In its Declaration appended to the joint request for approval of settlement being filed contemporaneously herewith, the third applicant -- Webber/Moore -- similarly states that it has determined that the market cannot support operation of another stand-alone television station, and thus has agreed to dismiss its application for reimbursement of a portion of its expenses.

10. This fact is further supported by Exhibit B hereto, a Declaration by Millard S. Younts, a media broker familiar with the market. Mr. Younts states that he has made inquiries as to the purchase of a stand-alone UHF station in the Greenville-New Bern-Washington market, where the Jacksonville facility would be located, with no indication of interest. Mr. Younts concludes, based on his experience in attempting to sell other stations in the market and his overall knowledge of the market, that no informed and rational businessperson would be interested in the operation of a new, stand-alone UHF station in the market and that the only way such a station would be economically viable is as a satellite of an existing VHF station in the market.

11. Moreover, to satisfy the third prong of the test, applicants for a new station seeking satellite authorization (as here) may submit "an economic showing, such as a history of television station failures in the market . . ., indicating that a full-service station is not likely to survive in that market." K2 Radio, Limited Partnership, FCC 93-19 (released January 25, 1993).

12. The Greenville-New Bern-Washington, North Carolina market, ADI number 104, already is served by four VHF commercial television stations: ABC affiliate WCTI(TV), Channel 12, New Bern, North Carolina; CBS affiliate WNCT-TV, Channel 9, Greenville, North Carolina; NBC affiliate WITN-TV, Channel 7, Washington, North Carolina; and Fox affiliate/independent WFXI(TV), Channel 8, Morehead City, North Carolina. Moreover, WFXI(TV), the independent station in the market, can never achieve technical equivalence with its ABC, CBS and NBC competitors, as WFXI(TV) is restricted to a site on the Atlantic coast, far from the center of the market. To make matters worse, WFXI(TV), though it complies with the minimum mileage separations, is subject to significant first-adjacent channel interference from CBS and NBC affiliates on Channels 7 and 9. This operates as a severe limitation on WFXI(TV)'s market coverage. In 1992, another independent station, WYDO(TV), Channel 14 in Greenville, North Carolina, commenced operations. In order to be economically viable, that station has entered into an LMA, rebroadcasting WFXI(TV) during a substantial portion of its broadcast day. This station helps to fill in portions of the market where WFXI cannot reach but, as shown in Exhibit A, this

station does not provide a city-grade signal to the Jacksonville area.

13. Without authority to operate as a satellite, the Jacksonville station would have to operate as a UHF, fully independent station under these market conditions. This has been attempted before, and the Commission's records are replete with a history of failures by would-be new UHF independents. Indeed, the channel at issue in this proceeding came open because a prior construction permit for the channel, granted in 1987, was finally cancelled in March 1991, having gone through two owners. See records concerning WJAE(TV), File No. BRCT-860304KE. A construction permit for Channel 38 in Greenville was authorized in June 1987 and, following the permittee's inability to construct the station, was cancelled on December 28, 1990.^{3/} A construction permit for a second Greenville channel, Channel 14, on which WYDO now operates, was issued in 1984, and cancelled in 1987. See records concerning WXIV-TV, File No. BPCT-820216KG. Three applicants reapplied for Channel 14, two of whom dismissed their applications for no consideration. As set forth above, while that station is now on the air, it is financially viable only through an LMA with WFXI(TV).

14. For television facilities just outside the Greenville-New Bern-Washington market, but which would serve portions of that market, the situation has been no different. Channel 30 in

3/ See Community Service Telecasters, Inc., 6 FCC Rcd 6026 (1991) (affirming cancellation of permit). In cancelling this Greenville permit, the Commission dismissed as moot an application to assign the permit to a corporation consisting of LTA principals, which proposed to operate the Greenville station primarily as a satellite of WFXI(TV).

Wilson, North Carolina, just to the west of the market, had a construction permit granted in 1985, which is still outstanding. The permit was recently cancelled, then reinstated following a request for reconsideration. See records concerning WEOU(TV), File No. BMPCT-891121KF. Channel 47 in Rocky Mount was granted a construction permit in 1988, and went on the air last year, operating essentially as a low power television station, at only 12 kilowatts from an antenna center of radiation of only 110 meters. Channel 17 in Goldsboro, North Carolina, in the eastern portion of the adjacent Raleigh-Durham market, was able to be activated only through a waiver of the duopoly rule.

15. In sum, the statements of the applicants in this proceeding and of a media broker familiar with the market, as well as the past history of failed stations, all establish that the Greenville-New Bern-Washington market will not support a new independent stand-alone television station. This showing clearly satisfies the third criterion of the Commission's presumptive test. Thus, as all three criteria are met, satellite authority should be approved.

Conclusion

Based on the foregoing, LTA respectfully requests the Presiding Judge to accept the attached amendment, approve the settlement filed concurrently herewith, and permit the operation

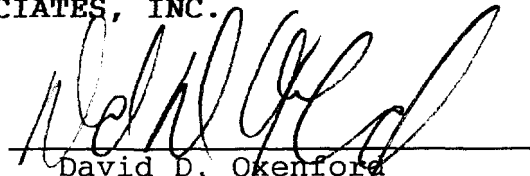
of the Jacksonville station as a satellite of WFXI(TV), pursuant to Note 5 of Section 73.3555(b) of the Commission rules.

Respectfully submitted,

LOCAL TELEVISION
ASSOCIATES, INC.

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By:


David D. Okenford
Gregory L. Masters

Its Attorneys

Dated: February 1, 1993

9708-000.P02

AMENDMENT

**CERTIFICATE OF
AMENDMENT**

I, John W. Gainey, III, President of Local Television Associates, Inc., hereby amend the corporation's pending application for a new television station at Jacksonville, North Carolina, with the attached material.


John W. Gainey, III

Date: January 29, 1993

AMENDMENT

1. Amend the ownership of the applicant to reflect that the permit will be held by a new North Carolina Corporation. The ownership of that corporation is set forth on Table A.
2. Amend the applicant's technical showing to reflect that it will adopt the Fitzgerald technical proposal.
3. Delete the divestiture commitment from the Local Television Associates, Inc. application relating to WFXI(TV), Morehead City, North Carolina. Substitute a request for authorization of the new Jacksonville station as a satellite of WFXI.

Table A
Ownership of New Corporation

	<u>Ownership Percentage</u>	<u>Officer</u>	<u>Director</u>
John W. Gainey III	12.60	President	X
Lockwood Phillips	5.54	Vice President	X
Walter Phillips	5.54	--	--
Ann Munden	12.60	Sec.-Treasurer	--
William R. Rollins	11.87	--	--
Robert R. Hilker	11.87	--	X
Frederick K. McCune	11.81	--	--
Ramon N. Redford	3.17	--	--
Charles Fitzgerald	25	--	X

EXHIBIT A

RUBIN, BEDNAREK & ASSOCIATES, INC.

CONSULTING TELECOMMUNICATIONS ENGINEERS

1350 CONNECTICUT AVENUE, NW - SUITE 610

WASHINGTON, DC 20036

ENGINEERING DECLARATION

Melvyn Lieberman hereby states as follows:

1. I am a telecommunications consultant and a Senior Engineer in the firm of RUBIN, BEDNAREK & ASSOCIATES, Inc., which has offices at 1350 Connecticut Avenue, NW., Washington, D.C. I hold a Bachelor of Science degree in Physics and have been providing consulting services in telecommunications since 1962. My qualifications are a matter of record with the Federal Communications Commission.
2. This Engineering Statement has been prepared on behalf of CHARLES FITZGERALD and LOCAL TELEVISION ASSOCIATES, INC. applicants for a new UHF television station at Jacksonville, North Carolina.
3. An engineering study of the 77 dBu (city grade) contour of WFXI-TV Morehead City, North Carolina and the 80 dbu (city grade) contour in the Fitzgerald application for Jacksonville, North Carolina indicates there is no overlap of these contours.
4. An engineering study of the 80 dBu (city grade) contour of WYDO, Greenville, North Carolina and the 80 dBu (city grade) contour in the Fitzgerald application for Jacksonville, North Carolina indicates there is no overlap of these contours.
5. I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Dated

Feb 1, 1993

Melvyn Lieberman
Melvyn Lieberman

EXHIBIT B

DECLARATION

I, Millard S. Younts, hereby declare under penalty of perjury:

1. I am President of Media Services Group, Inc., a company which specializes in media brokerage, appraisals, financing and consultation. Our business principally involves the sale and valuation of radio and television properties.
2. I am familiar with the Greenville-New Bern-Washington, North Carolina television market. The city of Jacksonville, North Carolina is in that market, and any television station licensed to Jacksonville would be in that market.
3. I have recently been involved with informal attempts to sell stations in the market, and have evaluated the possibility of the sale of a new UHF station in the market. After inquiring with our firm's contacts in the industry, I have found absolutely no interest on behalf of prospective purchasers in a new UHF stand-alone television station in the market.
4. The three major networks all have high-powered VHF network affiliates in this market. The Fox Network is also affiliated with a VHF station, WFXI(TV), Morehead City, North Carolina. While WFXI is a VHF station, its signal does not cover all of the fifteen counties in the ADI. The only operating UHF commercial station in the market is operating pursuant to an LMA with WFXI during a substantial portion of its broadcast day. This allows WFXI to reach portions of the market where its over-the-air signal is weak.
5. Based on my experience in attempting to sell other stations in the market, and my overall knowledge of the market and the industry, I do not believe that an informed and rational business person would be interested in the operation of a new, stand-alone UHF station in this TV market. I believe that the only way such a station would be economically viable is if it operates as a satellite of one of the existing VHF stations in the market.
6. The foregoing is true and correct to the best of my knowledge and belief.

 2/1/93
Millard S. Younts

CERTIFICATE OF SERVICE

I, Valerie A. Mack, hereby certify that I have this 1st day of February, 1993, mailed by first class United States mail, postage prepaid, copies of the foregoing "PETITION FOR LEAVE TO AMEND AND REQUEST FOR AUTHORITY FOR SATELLITE OPERATION" to the following:

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Valerie A. Mack

*Hand Delivered